



## STATE BOARD OF EQUALIZATION

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Executive Director

April 18, 1997

**RE: California Government Code, Section 7510(b)**

Dear Mr. :

In your letter of March 12, 1997 to Mr. Lawrence Augusta, Assistant Chief Counsel, you requested a letter of advisement on the proper interpretation and application of the referenced statute in relation to the following circumstances. In August of 1994 the California Public Employees Retirement System purchased a shopping center known as the Mira Mesa Mall in San Diego County. Your corporation owns Mervyn's, the anchor store. In accordance with section 7510(b)(1), the assessor established a new base year value for the mall and assessed Merlin's based on its leasable square feet divided by the total leasable square feet of the property. In your view this assessment is greater than the "market value" of the property and informally the assessor's staff agrees with your conclusion. The core of the problem is that the statute mandates "the same increment of value per square [foot] for all properties included in the sale regardless of market comparability."

This issue was previously addressed by our former Assistant Chief Counsel, Richard H. Ochsner, in his letter of April 20, 1994 to Mr. Dale Edgington, Principal Appraiser-Major Properties for the Los Angeles County Assessor. I am enclosing a copy of that entire letter for your perusal, but here I will concentrate only on the two applicable paragraphs. In regard to the validity of section 7510, Mr. Ochsner wrote in the third paragraph of his letter:

With respect to the validity questions, your attention is directed to section 3.5 of Article III of the California Constitution which essentially provides that an administrative agency has no power to declare a statute unenforceable, or to refuse to enforce a statute, on the basis

of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. Thus, for example, the clear provisions of subdivision (a) of section 7510 which states that subdivision (a) shall not apply to property owned by any state public retirement system, must be considered to be valid and enforceable by the county assessor or the State Board of Equalization. As administrative agencies, neither a county assessor nor the Board may refuse to enforce the statute on the grounds that it is unconstitutional unless an appellate court has so held. Of course, I am not aware of any appellate court decision which determines that any portion of section 7510 is invalid. Thus, even though there may be portions of the statute which we may reasonably believe could be successfully challenged on constitutional grounds, **we are required to follow the statute** unless, and until, the provision is either held invalid by an appellate court or it is changed by the Legislature.

This is currently a correct statement of the law. I would only add that Mr. Ochsner should have referred to subdivision (b) of the section as his example since the question concerned CALPERS property as does yours, but no matter because it applies to any statute. So at this point you are advised that the assessor and also the assessment appeals board are required to apply the plain meaning of the statute or else initiate legal action to secure the opinion of an appellate court.

It is in the fourth paragraph of Mr. Ochsner's letter that we part company:

With respect to the interpretative questions relating to subdivision (b) of section 7510, I suggest that you carefully review the statutory language. Paragraph (1) of subdivision (b) mandates that certain provisions be included in any lease of state public retirement system investment real property and improvements. The first requirement is that the lease include notice that the lessee's possessory interest may be subject to property taxation and the party in whom the possessory interest is vested may be subject to the payment of property taxes levied on that interest. This provision merely reflects the requirements of Revenue and Taxation Code section 107.6 which became effective January 1, 1978. The second requirement of paragraph (1) is that the lease also provide that the full cash value of the possessory interests shall equal the greater of (A) the full cash value of the possessory interest, or (B), if the lessee has leased less

than all of the property, the lessee's allocable share of the full cash value of the property that would have been enrolled if the property had been subject to property tax upon acquisition by the State Public Retirement System. The concern here, of course, is with **(B) which suggests that unless the lessee has a long term lease the possessory interest would be assessed at a value in excess of its market value.** Please note, however, that this is merely language which must be included in the lease which is a contract between the retirement system and the lessee. Thus, while the language mandates certain contractual provisions, **nothing in the language requires that an assessor assess the property in the described manner.** While it might be argued that such a direction may be inferred from the language, it is clear that **there is no express statement which directs the manner in which the property will be assessed for property tax purposes.** Thus, the language is, at best, extremely vague and ambiguous insofar as the assessment of the property by an assessor is concerned. (key points emphasized)

Here Mr. Ochsner notes that the legislature in (b)(1) requires language in the lease document informing the lessee that the possessory interest tax will be based on a pro rata square footage allocation of the acquisition full-cash value but does not explicitly mandate that methodology to the assessor. To me, this suggests an inherent conflict in the intent of the legislature or at least the careless omission of the necessary language. However, if you continue reading to subdivision (b)(5) you find:

**(5) This subdivision shall apply to the assessment, computation, and collection of taxes for the fiscal year beginning on July 1, 1992, and each fiscal year thereafter.** (last sentence omitted but the entire statute is enclosed)

This is a clear and unambiguous statement which directs the manner in which the property shall be assessed. There is no conflict or omission by the legislature. Subdivision (b)(1) states the method and orders that it be placed in the lease document and (b)(5) mandates the assessor to use the method. It factually contradicts the basis for Mr. Ochsner's conclusion. Subdivision (b)(5) appears on the reverse side of the page in the code books that we utilize (Vol. 2 of the Property Tax Law Guide) so there is the distinct possibility that Mr. Ochsner thought that the statute ended with subdivision (b)(1).

Additionally, I would also direct your attention to the first sentence in the final paragraph in Mr. Ochsner's letter: The views expressed in this letter, of course, [are] advisory and are not

binding upon any county assessor. We have checked with the addressee, Mr. Dale Edgington, and were informed that like the San Diego County Assessor, the Los Angeles County Assessor is not following the views expressed in the letter.

There is one final point that should be brought to your attention. You mentioned that the primary reason that you questioned section 7510 was because it resulted in an assessment that was greater than market value for your parcel. Although not stated, I would guess that your opinion of fair market value for the property derives from the past practice of using an income approach to value for that property. Once CALPERS became the fee owner of the entire shopping mall, it may no longer be entirely comparable to privately owned malls. The statute may, in fact, establish a more specific market for CALPERS properties and the result may be that a square footage allocation replaces the income approach in that regard. Consider the following excerpt from a recent case:

- (1) The rent-a-cars' possessory interests at LAX included only their counters, telephone boards, and signs, the latter two not having significant value.
- (2) The taxable value of these interests was fair market rent, which would be no greater than the **assessed value of airline counter space at the airport, then \$15 per square foot**. However, the rent-a-cars having sought reduction only to \$45 per foot, they would receive that measure.
- (3) The County's **contrary method of valuation, based on capitalized concession fees**, was invalid for two further reasons. First, it produced valuations of similarly situated, like-kind-and-character properties that widely differed between the rent-a-cars, in violation of constitutional requirements of uniform, equal taxation. Second, it improperly included income and value derived not from the property but from the rent-a-cars' {Page 13 Cal.App.4th 107} overall enterprises--i.e., business produced not by the airport counters but through advertising, goodwill, national reservation systems, and the like. fn. 1

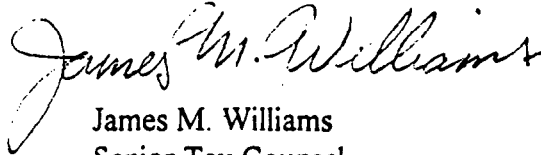
The judgment, rendered August 27, 1986, ordered reduction of the LAX assessments accordingly, together with refunds. **County of Los Angeles v. County of Los Angeles Assessment Appeals Bd. [13 Cal.App.4th 102] Feb. 10, 1993.** (emphasis added)

It may be worthwhile to have your counsel review this case as well as make an in depth analysis of the legislative history before you decide on a challenge to the statute.

April 18, 1997  
Page 5

In conclusion it is our view that California Government Code, Section 7510(b) has been both correctly interpreted and applied to your parcel in the Mira Mesa Mall by the San Diego County Assessor.

Very truly yours,



James M. Williams  
Senior Tax Counsel

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Enclosure

cc: Mr. James E. Speed MIC: 63  
Mr. Richard C. Johnson MIC: 64  
Mr. William Jackson MIC: 60  
Ms. Jennifer L. Willis MIC: 70  
Mr. Eugene Palmer MIC: 64

San Diego Assr., Attn. Mr. Dave Butler.  
Los Angeles Assr., Attn. Mr. Dale Edgington.  
Mr. Andrew J. Freeman, Deputy County Counsel